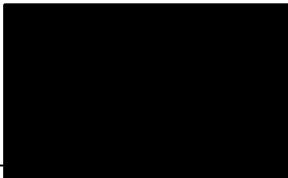




**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION

MDV/165829

The attached proposed decision of the hearing examiner dated September 10, 2015 is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

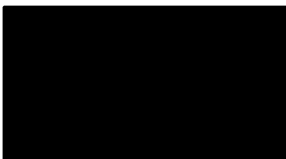
Pursuant to a petition filed May 04, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Grant County Department of Social Services in regard to Medical Assistance, a telephonic hearing was held on June 16, 2015, at Lancaster, Wisconsin. At the request of petitioner's attorney, a hearing set for June 10, 2015 was rescheduled. At the request of the parties, the record was held open for consecutive closing argument to the Division of Hearings and Appeals (DHA) with copies sent to the other party. The parties timely submitted their written arguments to DHA which are received into the hearing record.

The issues for determination are: a) whether the petitioner has "cured" the divestment period from September 4, 2013 to November 11, 2015 ordered by DHA Judge Gagnon in petitioner's prior divestment appeal in MDV/157143 (issued 8-8-2014); and b) whether the county agency correctly denied the petitioner's February 25, 2015 MA re-application because a transfer into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

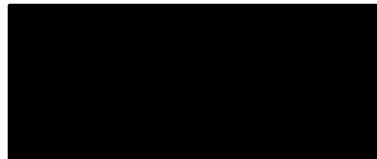
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

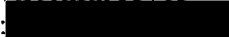


Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By:  ESS

Grant County Department of Social Services
Hwys 35 and 61 South
PO Box 447
Lancaster, WI 53813

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Grant County.
2. The petitioner entered a nursing home on September 4, 2013, and has remained there.
3. The petitioner's wife, who remains in the community, created an irrevocable family trust on September 13, 2013. The trust provided that trust assets/income could be paid to the beneficiaries only in the trustee's discretion. On September 20, 2013, the wife loaned \$327,706.98 (the couple's non-real estate assets) to the trust. In return the trust was supposed to pay \$27,350.35 monthly to the wife for twelve months. The interest rate on the loan was 0.28% annually.
4. In 2011, the petitioner and his wife sold their family farm to their son on a land contract, at a sale price of \$240,000. The son paid \$20,000 down, with the remainder to be paid to the couple over 15 years in monthly payments of \$1,739.75, and an interest rate of 5.00% annually. On September 20, 2013, the petitioner and his wife assigned their interest in the land contract to their son, meaning that he would then be making monthly payments on the contract to himself.
5. The petitioner applied for Long-Term Care/Institutional MA on October 17, 2013, requesting backdating to September 4, 2013. The agency denied that application on November 11, 2013, due to excess assets in a trust. As part of that process, the agency determined that the applicable asset limit was \$117,920.00 (+\$2,000).
6. A fair hearing was conducted, with Administrative Law Judge Schneider of this office presiding. He concluded that the trust assets are not available to the petitioner and his wife. The judge questioned whether the note was valid if the petitioner did not sign the note. If it is valid, the judge wondered whether the petitioner has a full interest in the monthly \$27,350 payments. Finally, he wondered if the land contract assignment was a divestment. He remanded the matter to the county agency for a further determination. DHA Decision MGE/154182 (Wis. Div. of Hearings & Appeals February 28, 2014)(DHS).
7. On March 13, 2014, the agency issued written notice of denial to the petitioner. The basis for denial was excess assets. The agency determined that the trust promissory note was valid. It also determined that the trust promissory note payments (\$27,350.35 monthly) were assets.

The assets that the agency compared against a \$52,000 asset limit totaled \$92,979.03 and were the following: \$27,350.35 monthly trust payment, petitioner's IRA of \$29,432.54, [REDACTED] of \$10,253.54, [REDACTED] of \$8,450.53, and an [REDACTED] of \$17,491.87. None of these assets are within the trust.
8. As part of its March 2014 redetermination, the agency concluded that the couple's assets, excluding the unavailable trust assets, totaled \$92,979.03 in September 2013. That asset figure in the "asset snapshot" means that the applicable asset limit must be \$52,000 for the couple.
9. In her August 8, 2014 decision in petitioner's prior divestment appeal in MDV/157143, ALJ Gagnon concluded in pertinent part that petitioner or his community spouse divested \$194,684.56 in September 2013. In that same decision, Judge Gagnon remanded the case to the county agency with instructions to determine (1) when the petitioner's available assets fell under \$119,240, and (2) the duration of the petitioner's divestment penalty period, based on a divested amount of \$194,684.56 in September 2013. The agency determined that petitioner's divestment period was from September 4, 2013 to November 11, 2015.

10. On November 30, 2014, [REDACTED] executed an assignment of land contract returning to the petitioner and his wife the \$194,684.56 remaining interest in order to “cure” the divestment.
11. Later on November 30, 2014, the petitioner’s power of attorney transferred petitioner’s interest in the land contract to his wife, [REDACTED]
12. Subsequently on November 30, 2014, [REDACTED] transferred the \$194,684.56 interest in the land contract to the [REDACTED] by executing an assignment of land contract in exchange for a promissory note which created conditions for the repayment of the balance to [REDACTED] (not to petitioner, [REDACTED]).
13. That promissory note specifically stated that the note was “non-negotiable, non-salable, and non-transferable.”
14. On February 25, 2015, the petitioner submitted a re-application for Long Term Care MA requesting backdating to November 1, 2014.
15. On April 20, 2015, the county agency denied that re-application based upon Judge Gagnon’s decision in MDV/157143, the resultant divestment penalty period until November 11, 2015, and its determination that the petitioner had not cured the divestment which would end November 11, 2015.
16. The petitioner filed a timely May 4, 2015 appeal of the MA denial.
17. In its June 26, 2015 closing argument, the county agency asserted the promissory note permitted the lender to grant renewals or extensions of that promissory note. Such modifications of the promissory note makes questionable whether that note met the three required criteria by the Medicaid Eligibility Handbook (MEH) sec. 17.12.2, and created a new divestment.

DISCUSSION

A divestment does not bar eligibility if the “ownership of the divested property was returned to the individual who originally disposed of it.” Wis. Admin. Code, § 103.065(4)(d)2.c. This provision had allowed an applicant to reduce his/her divestment penalty period if a portion of the money he/she gave away was returned to him/her. For example, if a nursing home resident gave away \$24,349 but received all except \$2,434.90 back, the divestment penalty, based upon \$243.49 per day, would be 10 rather than 100 days.

That has changed. Federal law now allows agencies to adjust the penalty period only if “all assets transferred for less than fair market value have been returned to the individual.” 42 USC 1396p(c)(2)(C)iii. Last year, the Wisconsin legislature amended Wis. Stat. 49.453(8)(a)1. so that it conforms with the federal statute. It now reads: read:

To make a satisfactory showing to the state under 42 USC 1396p(c)(2)(C) and adjust the ineligibility period under sub. (3), the individual shall demonstrate that all of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market, have been returned to him or her.

2013 Wisconsin Act 20, § 1064.

The Department’s policy interpreting these laws states:

When the entire divested resource or equivalent value is returned to the individual, the entire penalty period is nullified. You must then re-evaluate the individual’s Medicaid eligibility for LTC services retroactively, back to the beginning date of the previously imposed penalty period. The individual can then be certified for Medicaid LTC services if s/he met all other eligibility requirements during this retroactive adjustment period. The refunded resources

will be counted as available assets beginning with the month in which they were returned.
(Emphasis added).

Medicaid Eligibility Handbook, § 17.5.5.1.

During the June 16, 2015 hearing and in his briefs, [REDACTED] correctly argued that the assignment of land contract from [REDACTED] to the petitioner and his spouse “cured” the original divestment because the entire divested property was returned to the petitioner and his wife. Thus, the agency was incorrect to deny the petitioner’s February 25, 2015 re-application on the basis that the return of the original divestment did not cure that divestment. As a result, the cure of the divestment also ended the penalty period until November 11, 2015 which was based upon Judge Gagnon’s decision in MDV/157143. However, much of Judge Gagnon’s Findings of Fact have been incorporated in this decision, as they provide an accurate history of this case (as well as ALJ Schneider’s earlier decision of petitioner in MGE/154182 with [REDACTED] also representing the same petitioner).

In the instant case, petitioner’s actions on November 30, 2014 created a new divestment. Wis. Stat. § 49.454 applies to trusts established by an individual or his or her spouse with assets of the individual or his or her spouse. Wis. Stat., §49.454(3) provides with regard irrevocable trusts:

For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

(a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:

1. To or for the benefit of the individual, are considered income of the individual.
2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

The MA Handbook, App. 17.13.3, interprets the statute:

The following actions are divestment if they took place during the lookback period or any time after:

1. An irrevocable trust was created. The divested amount is the total amount of the created trust....
2. Funds were added to the irrevocable trust. The *divested amount* is the amount of the added funds.

Underlining and italics in original.

A second statutory section is at issue in this case. Wis. Stat., 49.453(4)(ag) provides:

For the purposes of sub. (2) [the divestment provision], whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par (am), the applicable federal rate required under section 1274(d) of the Internal Revenue Code, as defined in s. 71.01(6)....

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

See also the MA Handbook, App. 17.12.2. Essentially, if funds are loaned via a promissory note that has an actuarially sound repayment term, provides for equal payments, and does not allow for cancellation upon the lender's death, the loan is not a divestment.

This case involves a combination of the creation of an irrevocable trust and subsequent transfer of funds into it, and also a promissory note. The agency has taken the position that the transfer of the funds to the irrevocable trust is a divestment regardless of the note. Petitioner argues that the note is a valid use of the funds regardless of its maker.

I am aware of a similar case, with [REDACTED] representing the petitioner, case no. MDV-163634. That decision concluded that the transfer to the irrevocable trust took precedence over the note, and therefore a divestment occurred. Another decision issued July 21, 2015 in case no. MDV-165574 found a similar transaction to be a divestment.

I conclude that the prior decisions were correct. It is clear that a transfer of property to an irrevocable trust is a divestment. It also is true that an actuarially sound promissory note is not a divestment. In a situation like this, where both types of transactions occurred, the issue becomes which provision takes precedence. The Wisconsin Court of Appeals has already provided the answer. In *Estate of Gerald Gonwa v. Wisconsin Department of Health and Family Services*, 265 Wis. 2d 913 (Ct. App. 2003) petitioner transferred funds to an irrevocable trust through a private annuity. The legal issue was whether the trust provisions were to be given precedence over the general transfer of assets provisions. The Court agreed with the Department that regardless of whether the asset held in an irrevocable trust is transferred as an annuity, it is nevertheless held in an irrevocable trust and § 49.454 determines the outcome. Therefore, it held that a divestment occurred despite the fact that the terms of the annuity itself met transfer of asset requirements. Here Petitioner used a promissory note rather than an annuity as the means to transfer funds to the irrevocable trust. I do not find that to be a meaningful distinction because what matters is that the funds are held in an irrevocable trust.

The type of Medicaid planning attempted by Petitioner is precisely what Congress sought to prevent in its 1993 changes to Medicaid trusts. *Gonwa* quoted the House Committee on Energy and Commerce as follows:

The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

H.R. REP. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985).

In this case, the intent clearly is to divest over \$194,000 so that none of it will be used to pay for petitioner's nursing home care. Under the Spousal Impoverishment provisions of Wis. Stat., §49.455, if petitioner is found eligible for nursing home MA, monthly payments made to petitioner's wife will have

no impact on petitioner's MA eligibility. Thus, in essence, petitioner's wife will have taken \$194,000 that could be used to pay for petitioner's care and made it unavailable to use for petitioner's care. That is a classic divestment.

Further evidence of the intent is that the promissory note is specifically non-negotiable, non-salable, and non-transferable. Under normal circumstances a note in itself would have value, but not if it cannot be sold. The only reason to put the non-sale provision in the note is to remove any value from the MA asset determination.

Under the clear language of Wis. Stat., §49.454, the money here was transferred to an irrevocable trust. None of the money transferred can be used for petitioner's benefit. Thus the transfer is a divestment. The fact that petitioner's wife, in her trustee role, agreed to pay the money to herself via a promissory note has no bearing on the divestment since the net effect is that the money has been taken away from petitioner and he has received nothing in return. Petitioner was unable to refute that the payments to petitioner's wife via the promissory note were a divestment to petitioner because those payments were "taken away" from the petitioner and he received nothing in return for that promissory note. Petitioner's attorney did not establish any reason for those actions but to remove any value from the MA asset determination in order to make the petitioner asset eligible for Long Term Care Medical Assistance.

CONCLUSIONS OF LAW

A transfer of \$194,684.56 into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

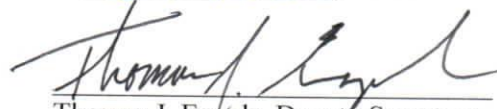
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 23 day
of October, 2015.

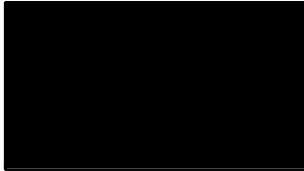

Thomas J. Engels, Deputy Secretary
Department of Health Services



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



PROPOSED DECISION

MDV/165829

PRELIMINARY RECITALS

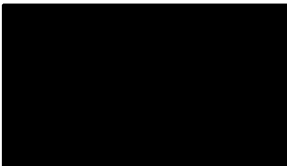
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The issues for determination are: a) whether the petitioner has "cured" the divestment period from September 4, 2013 to November 11, 2015 ordered by DHA Judge Gagnon in petitioner's prior divestment appeal in MDV/157143 (issued 8-8-2014); and b) whether the county agency correctly denied the petitioner's February 25, 2015 MA re-application because a transfer into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

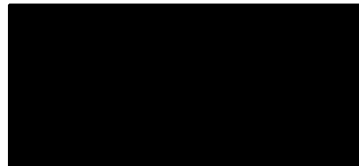
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By:  ESS

Grant County Department of Social Services
Hwys 35 and 61 South
PO Box 447
Lancaster, WI 53813

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Grant County.
2. The petitioner entered a nursing home on September 4, 2013, and has remained there.
3. The petitioner's wife, who remains in the community, created an irrevocable family trust on September 13, 2013. The trust provided that trust assets/income could be paid to the beneficiaries only in the trustee's discretion. On September 20, 2013, the wife loaned \$327,706.98 (the couple's non-real estate assets) to the trust. In return the trust was supposed to pay \$27,350.35 monthly to the wife for twelve months. The interest rate on the loan was 0.28% annually.
4. In 2011, the petitioner and his wife sold their family farm to their son on a land contract, at a sale price of \$240,000. The son paid \$20,000 down, with the remainder to be paid to the couple over 15 years in monthly payments of \$1,739.75, and an interest rate of 5.00% annually. On September 20, 2013, the petitioner and his wife assigned their interest in the land contract to their son, meaning that he would then be making monthly payments on the contract to himself.
5. The petitioner applied for Long-Term Care/Institutional MA on October 17, 2013, requesting backdating to September 4, 2013. The agency denied that application on November 11, 2013, due to excess assets in a trust. As part of that process, the agency determined that the applicable asset limit was \$117,920.00 (+\$2,000).
6. A fair hearing was conducted, with Administrative Law Judge Schneider of this office presiding. He concluded that the trust assets are not available to the petitioner and his wife. The judge questioned whether the note was valid if the petitioner did not sign the note. If it is valid, the judge wondered whether the petitioner has a full interest in the monthly \$27,350 payments. Finally, he wondered if the land contract assignment was a divestment. He remanded the matter to the county agency for a further determination. DHA Decision MGE/154182 (Wis. Div. of Hearings & Appeals February 28, 2014)(DHS).
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The assets that the agency compared against a \$52,000 asset limit totaled \$92,979.03 and were the following: \$27,350.35 monthly trust payment, petitioner's IRA of \$29,432.54, [REDACTED] of \$10,253.54, [REDACTED] of \$8,450.53, and an [REDACTED] of \$17,491.87. None of these assets are within the trust.
8. As part of its March 2014 redetermination, the agency concluded that the couple's assets, excluding the unavailable trust assets, totaled \$92,979.03 in September 2013. That asset figure in the "asset snapshot" means that the applicable asset limit must be \$52,000 for the couple.
9. In her August 8, 2014 decision in petitioner's prior divestment appeal in MDV/157143, ALJ Gagnon concluded in pertinent part that petitioner or his community spouse divested \$194,684.56 in September 2013. In that same decision, Judge Gagnon remanded the case be to the county agency with instructions to determine (1) when the petitioner's available assets fell under \$119,240, and (2) the duration of the petitioner's divestment penalty period, based on a divested amount of \$194,684.56 in September 2013. The agency determined that petitioner's divestment period was from September 4, 2013 to November 11, 2015.
10. On November 30, 2014, [REDACTED] executed an assignment of land contract returning to the petitioner and his wife the \$194,684.56 remaining interest in order to "cure" the divestment.

11. Later on November 30, 2014, the petitioner's power of attorney transferred petitioner's interest in the land contract to his wife, [REDACTED]
12. Subsequently on November 30, 2014, [REDACTED] transferred the \$194,684.56 interest in the land contract to the [REDACTED] by executing an assignment of land contract in exchange for a promissory note which created conditions for the repayment of the balance to [REDACTED] (not to petitioner, [REDACTED]).
13. That promissory note specifically stated that the note was "non-negotiable, non-salable, and non-transferable."
14. On February 25, 2015, the petitioner submitted a re-application for Long Term Care MA requesting backdating to November 1, 2014.
15. On April 20, 2015, the county agency denied that re-application based upon Judge Gagnon's decision in MDV/157143, the resultant divestment penalty period until November 11, 2015, and its determination that the petitioner had not cured the divestment which would end November 11, 2015.
16. The petitioner filed a timely May 4, 2015 appeal of the MA denial.
17. In its June 26, 2015 closing argument, the county agency asserted the promissory note permitted the lender to grant renewals or extensions of that promissory note. Such modifications of the promissory note makes questionable whether that note met the three required criteria by the Medicaid Eligibility Handbook (MEH) sec. 17.12.2, and created a new divestment.

DISCUSSION

A divestment does not bar eligibility if the "ownership of the divested property was returned to the individual who originally disposed of it." Wis. Admin. Code, § 103.065(4)(d)2.c. This provision had allowed an applicant to reduce his/her divestment penalty period if a portion of the money he/she gave away was returned to him/her. For example, if a nursing home resident gave away \$24,349 but received all except \$2,434.90 back, the divestment penalty, based upon \$243.49 per day, would be 10 rather than 100 days.

That has changed. Federal law now allows agencies to adjust the penalty period only if "all assets transferred for less than fair market value have been returned to the individual." 42 USC 1396p(c)(2)(C)iii. Last year, the Wisconsin legislature amended Wis. Stat. 49.453(8)(a)1. so that it conforms with the federal statute. It now reads: read:

To make a satisfactory showing to the state under 42 USC 1396p(c)(2)(C) and adjust the ineligibility period under sub. (3), the individual shall demonstrate that all of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market, have been returned to him or her.

2013 Wisconsin Act 20, § 1064.

The Department's policy interpreting these laws states:

When the entire divested resource or equivalent value is returned to the individual, the entire penalty period is nullified. You must then re-evaluate the individual's Medicaid eligibility for LTC services retroactively, back to the beginning date of the previously imposed penalty period. The individual can then be certified for Medicaid LTC services if s/he met all other eligibility requirements during this retroactive adjustment period. The refunded resources will be counted as available assets beginning with the month in which they were returned. (Emphasis added).

Medicaid Eligibility Handbook, § 17.5.5.1.

During the June 16, 2015 hearing and in his briefs, [REDACTED] correctly argued that the assignment of land contract from [REDACTED] to the petitioner and his spouse "cured" the original divestment because the entire divested property was returned to the petitioner and his wife. Thus, the agency was incorrect to deny the petitioner's February 25, 2015 re-application on the basis that the return of the original divestment did not cure that divestment. As a result, the cure of the divestment also ended the penalty period until November 11, 2015 which was based upon Judge Gagnon's decision in MDV/157143. However, much of Judge Gagnon's Findings of Fact have been incorporated in this decision, as they provide an accurate history of this case (as well as ALJ Schneider's earlier decision of petitioner in MGE/154182 with [REDACTED] also representing the same petitioner).

In the instant case, petitioner's actions on November 30, 2014 created a new divestment based upon similar DHA divestment cases which are current proposed decisions before the Secretary's office. In a very recent proposed decision in MDV/166650 by ALJ Brian Schneider (issued July 30, 2015), Judge Schneider explained in the following analysis from the Discussion Section of his decision that a transfer into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner:

Wis. Stat., §49.454(3) provides with regard irrevocable trusts:

For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

(a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:

1. To or for the benefit of the individual, are considered income of the individual.
2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

The MA Handbook, App. 17.13.3, interprets the statute:

The following actions are divestment if they took place during the lookback period or any time after:

1. An irrevocable trust was created. The divested amount is the total amount of the created trust....
2. Funds were added to the irrevocable trust. The *divested amount* is the amount of the added funds.

Underlining and italics in original. A second statutory section is at issue in this case. Wis. Stat., 49.453(4)(ag) provides:

For the purposes of sub. (2) [the divestment provision], whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by

promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par (am), the applicable federal rate required under section 1274(d) of the Internal Revenue Code, as defined in s. 71.01(6)....

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

See also the MA Handbook, App. 17.12.2. Essentially, if funds are loaned via a promissory note that has an actuarially sound repayment term, provides for equal payments, and does not allow for cancellation upon the lender's death, the loan is not a divestment.

This case involves a combination of the creation of an irrevocable trust and subsequent transfer of funds into it, and also a promissory note. The agency has taken the position that the transfer of the funds to the irrevocable trust is a divestment regardless of the note. Petitioner argues that the note is a valid use of the funds regardless of its maker.

I am aware of a similar case, with [REDACTED] representing the petitioner, which recently was issued as a proposed decision to the Department's Deputy Secretary for further consideration, case no. MDV-163634 (proposed decision on rehearing dated 7/20/15). That decision concluded that the transfer to the irrevocable trust took precedence over the note, and therefore a divestment occurred. Another proposed decision issued July 21, 2015 in case no. MDV-165574 found a similar transaction to be a divestment.

I conclude that the prior decisions now before the Deputy Secretary were correct. My reasoning goes further, however. It is clear that a transfer of property to an irrevocable trust is a divestment. It also is true that an actuarially sound promissory note is not a divestment. In a situation like this, where both types of transactions occurred, I believe the analysis should be the intent of the transactions. In this case, the intent clearly is to divest over \$500,000 so that none of it will be used to pay for petitioner's nursing home care. Under the Spousal Impoverishment provisions of Wis. Stat., §49.445, if petitioner is found eligible for nursing home MA, monthly payments made to petitioner's wife will have no impact on petitioner's MA eligibility. Thus, in essence, petitioner's wife will have taken \$500,000 that could be used to pay for petitioner's care and made it unavailable to use for petitioner's care. That is a classic divestment.

Further evidence of the intent is that the promissory note is specifically non-negotiable, non-salable, and non-transferable. Under normal circumstances a note in itself would have value, but not if it cannot be sold. The only reason to put the non-sale provision in the note is to remove any value from the MA asset determination.

Under the clear language of Wis. Stat., §49.454, the money here was transferred to an irrevocable trust. **None of the money transferred can be used for petitioner's benefit.** Thus the transfer is a divestment under Wis. Stat., §49.453. The fact that

petitioner's wife, in her trustee role, agreed to pay the money to herself via a promissory note has no bearing on the divestment **since the net effect is that the money has been taken away from petitioner and he has received nothing in return.**

(Emphasis added).

In the instant case, the facts are very similar to MDV/166650, a transfer to an Irrevocable Trust occurred followed by a transfer to a promissory note. That promissory note like the above case included specific provisions that the note was non-negotiable, non-salable, and non-transferable. Furthermore, petitioner was unable to refute that the payments to petitioner's wife via the promissory note were a divestment to petitioner because those payments were "taken away" from the petitioner and he received nothing in return for that promissory note. Petitioner's attorney did not establish any reason for those actions but to remove any value from the MA asset determination in order to make the petitioner asset eligible for Long Term Care Medical Assistance.

CONCLUSIONS OF LAW

A transfer of \$194,684.56 into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

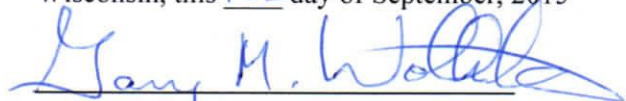
This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 10th day of September, 2015



Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals